

From: Michael Warburton
Sent: Tuesday, January 20, 2004 11:10 AM
To: Guivetchi, Kamyar; Dabbs, Paul
Subject: Comments on Draft Plan Chapters 2 and 6

Martin Luther King Day, 2004

Paul and Kamyar,

I agree with the views expressed by the Environmental Caucus regarding the sudden and inappropriate change in tone and orientation of Chapter 1 to reflect so overwhelmingly the positions and perspectives of a small group of water project contractors. But similar adjustments are simultaneously happening in other parts of the draft plan as well, and I am wondering if the Department of Water Resources was ever really serious about using the input of the Advisory Committee to move toward consensus even on the aspects of water policy where there is substantial agreement among various stakeholders. Text is changing and key points are being removed that I had been counting on as evidence of some degree of sincerity on the part of DWR. This might be happening for other constituencies as well. And maybe some of the impenetrable language describing some conditions is the result of attempts to please some unnamed constituency or another. But if this whole exercise has been intended all along as a program for sapping the capacity and dissipating the focus of public energy that might have otherwise been useful in addressing longstanding problems in California Water Policy, it could yet be pronounced extremely effective. I don't want to think that, so I am still devoting a lot of time and energy to seriously reading the materials that are being generated and commenting on them from the basis of what I see happening on the ground and what my constituent organizations are trying to achieve. I thought that is what the planning team wanted but there is a distinct danger that the results might be shaping up into a product that my constituent organizations might consider a waste of effort.

In speaking of bottom lines, acknowledgement of historically disproportionate health and environmental impacts being borne by the most economically and politically vulnerable communities in California is essential along with a commitment to do better. We have the tools and capacity to take steps to change the current situation, indeed state agencies which are legal trustees for the public have an affirmative obligation to do so. I won't ask the rhetorical question of why the status quo is so persistent, but the convenience of the powerful is becoming a tired excuse for future suffering and injustice. Perhaps I am more moved today than usual by the words and commitment of Martin Luther King, Jr., but those words are there in the newspapers I was reading this morning and maybe it is more difficult than usual to just accept the kinds of assumptions and tacit conventions which pave the way for injustice. I hope that motivation is clear in the following comments.

All best,
MW

In Chapter 2

1. Although Native Americans are now mentioned as existing in the historical landscape, maybe it should be noted that they didn't "divert"

very much water. I don't think you can acknowledge vibrant historical salmon fisheries and at the same time say that they didn't "use" much water.

2. The "small settlements remaining from Mexican occupation" belie the extent of individual landholdings which to this day impact the amount of water used in particular locations.

3. When the state and federal governments are mentioned as "responsible to represent and protect" the public trust, perhaps "and assure that trust resources will be available for public use by present and future generations" should be added.

4. It is hard to know what "For some tribes, their natural resources rights had little value for many years." means for the Department of Water Resources.

5. On 2-9, Public agencies, districts and local governments, the words "constituents and customers" might be better than "customers" which implies only an economic relationship.

6. There is no sense of the vast range in amounts of water used by "individual water users." This is one place where misleading language fails to give a realistic picture of vastly different power bases underlying some aspects of the California water system. The description of return flows "usually through a sewer or gutter" calls to mind a simple family farm or house and is misleading when applied to an abstract class of "individual water users." It fails to give the public adequate information to understand their water system.

7. In section 2-4, the public trust doctrine description fails to mention obligations to future generations, the extension of the doctrine to include tributaries of navigable waters or the historic notion of inalienability of public trust responsibilities, and it obscures public responsibilities arising from increasing scientific knowledge and changing social values under a rubric of "the SWRCB may reconsider past water allocation decisions in light of current knowledge and current needs." It is truly important that the common law basis for public rights be presented in an integrated manner with all of these elements in this background section.

8. When describing surface water rights, the introductory statement is misleading. California was a territory before it was a state and common law was in force at that time, and the Treaty of Guadalupe Hidalgo also had provisions affecting water right claims. The pre-statehood miners' customary use should not be given the level of authority implied by current language in the text.

9. It might be useful to add that pre-1914 rights are subject to "reasonable and beneficial use, waste limitations and the public trust."

10. In the water contracts section on line 46, the language implies that state and federal projects have the same procedures for paying for capital and operating costs, and that while sometimes deliveries are less than contracted amounts, it gives no figures for long term average deliveries. This is important information for California citizens who want to know about California water and it should be included in the section talking about the situation today.

11. The box on international trade agreements is misleading and fails to

mention that water that has "entered commerce" might be subject to "proportionality" and "lost profits" provisions of Chapter 11. The GATS statement does not capture the impact of closed door dispute resolution tribunals where neither the public nor the state can be meaningful participants. There is very real public concern that International Trade Agreements will indeed limit the capacity of the state to protect public health and the environment and this text seems more a gratuitous concession to special interests than a public service to Californians reading their State Water Plan. Perhaps if this section is included, information might be added about the adverse consequences of the purchase of municipal water systems by transnational corporations with accompanying rate increases and declining quality of services. When such systems are bought at premiums above facility appraisal, the debt is usually charged to the captive ratepayers and no benefits are realized by the public. This is actually a large problem on the California horizon and it is never mentioned in this water plan.

12. "Regulations" is too narrow to capture legal requirements governing water management and list should include California Public Trust Doctrine somewhere; it is not clear why the following page has sections on water releases for environmental purposes, water transfers and area of origin protections. Why not hydro-power relicensing, flood control or agricultural subsidy policy or even the reasonable use and waste provisions of the Constitution? If the point is to say that many different initiatives are being launched by different agencies under different legal authority to manage water resources, why not say so?

13. In "Institutional tools," "Increasing knowledge" may be better than "Education" (at least the type of education envisioned in this section which flows only one direction and only helps authorities manage the public more effectively - if the goal is better managing a valuable public resource, public authorities can learn some new things too!). The list of subjects might include water rights and competing public values in addition to scientific knowledge about inter related aspects of water systems.

14. In the Challenges section, taking out all reference to historically disproportionate impacts on California's vulnerable communities, and characterizing it as a rural problem only and then not mentioning Environmental Justice is absolutely unacceptable. The problems of use of data that obscure locally disproportionate effects and lack of meaningful representation of these communities in decision-making is also a problem.

15. The section on Constraints on Inter-regional deliveries has been wordsmithed to death and the basic idea that public assets may be converted to private property is not reflected at all, and it is not even clear what the paper water issue is: It is not that there just might not be real water involved, but also that the transfer process could create real wealth for private individuals and high costs for both the environment and the public at large. Merely saying that it has received recent scrutiny does not serve to say what the problem is, or even to hint at the profound historical problem created by overallocation of "water rights."

16. The new overdraft section certainly clarifies the concept, and it thankfully acknowledges what sorts of things haven't been measured. But it doesn't say what the challenge is or how much water might be involved. It doesn't even say whether we have been relying unsustainably on the availability of groundwater to substitute for shortages of surface

water. The reader gets the idea that there might be a problem, but is left with too few hints about where it may fit in with other conditions.

18. Planning laws requiring demonstrated water supplies and changes in the paper water and development landscape since the Monterey litigation should be described in text in this chapter and not merely left in a table.

For Chapter 6:

>1. For a number of strategies, the protection of public trust values can
>clearly be seen as "challenges" to implementation, yet the Department does
>not seem to want to explicitly recognize this in either text or
>tables. These values encompass both the physical condition of trust
>assets as well as institutional safeguards for decision making and
>continuing supervision. There is also a very clear problem that public
>assets could be converted to private property without a more nuanced
>approach to what is being bought and what is being sold in the course of
>water "transfers." It would be helpful to underline those areas where
>public interests are most vulnerable and thus in need of enhanced
>protection. It is really good to see that the recommendation concerning
>the continued management of water as a public trust has made it into the
>list of Chapter 6 Recommendations meriting descriptions of how it might be
>implemented.

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>2. Because Water is classed as a good in NAFTA, it becomes subject to
>"proportionality" and "lost profits" provisions of Chapter 11 when it
>enters commerce. This could limit the state in regulating conduct to
>protect public health and the environment, and dispute resolution forums
>would not be open to the public as parties. Water diverted for transfer
>to unspecified parties and uses could be key actions triggering this
>treatment and clear loss of capacity for local supervision, so this should
>be included as an implementation challenges.

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> In the implementation chapter, a few recommendations for the
> "how" section might be:

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>Ensure that legal counsel to State and Regional Water Quality Control
>Boards explicitly note public trust considerations when presenting agenda
>items to their Boards. (The Water Plan has several references to the
>Boards as protectors of public trust values, but they don't tend to take
>on this duty when they don't talk about it.)

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>Make a good faith effort to ensure that advisory and decision-making
>bodies reflect the diverse perspectives held by Californians impacted by
>water policies and decisions.

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>Use scientific data and methods of analysis that do not obscure locally
>disproportionate impacts.

Thanks for your consideration of these points.

All best,
Michael Warburton